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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
SIXTH APPELLATE DISTRICT

In re the Marriage of KENNETH NELSON
and ELIZABETH NELSON,

H034545

(Santa Clara County
Super. Ct. No. FL133095)

KENNETH NELSON,

Plaintiff and Appellant,

v.

ELIZABETH NELSON,

Defendant and Respondent.

I. INTRODUCTION

Appellant Kenneth Nelson (Kenneth) challenges the trial court's order denying his motion for modification of spousal support in this marital dissolution action. Kenneth argues that the trial court erred in finding that he had failed to make the showing of changed circumstances that is required for modification of permanent spousal support. For the reasons stated below, we find that the trial court did not abuse its discretion in denying Kenneth's motion. Therefore, we will affirm the order.

II. FACTUAL AND PROCEDURAL BACKGROUND

A. *The Marital Settlement Agreement and Judgment*

Our summary of the factual and procedural background is taken from the limited record on appeal.

The record reflects that Kenneth and Elizabeth Nelson (Elizabeth) were married on August 19, 1983 and separated on May 1, 2006. Kenneth filed a petition for dissolution of marriage on April 26, 2006. Judgment of dissolution was entered on August 28, 2007. The length of the parties' marriage was therefore more than 22 years.

During the dissolution proceedings, the parties entered into a marital settlement agreement, which was incorporated in the judgment filed on August 28, 2007. The parties also agreed to a qualified domestic relations order (QDRO)¹ filed on July 19, 2007, regarding the division of Kenneth's California Public Employees' Retirement System (CalPERS) retirement benefits. The record reflects that the QDRO indicated that Kenneth "was 'currently receiving \$5,822.12 a month in retirement benefits under an unmodified allowance.' " The QDRO also stated that Elizabeth should begin to receive payments from CalPERS " 'as soon as administratively practicable.' "

The record on appeal did not include either the judgment, the marital settlement agreement, or the QDRO. However, it appears to be undisputed that the terms of the marital settlement agreement included the following provision regarding spousal support: "Neither party shall pay spousal support to the other at this time, with the Court reserving jurisdiction to modify this order upon a showing of changed circumstances

¹ "Under ERISA [the federal Employee Retirement Income Security Act of 1974, title 29 United States Code section 1001 et seq] spouses in dissolution actions may not transfer rights in retirement benefits unless the court so orders in a QDRO. (29 U.S.C. § 1056, subd. (d)(1); [Citation].) A QDRO is a judgment or order that creates a right in a former spouse to receive all or a portion of the benefits payable to the participant in a pension plan. (29 U.S.C. § 1056, subd. (d)(3)(B)(i)(I).)" (*In re Marriage of Gray* (2007) 155 Cal.App.4th 504, 511)

Jurisdiction over spousal support payable to [Kenneth] shall be reserved until his death, his remarriage or further court order.”

B. The Motion for Modification of Spousal Support

On March 5, 2008, Kenneth filed an order to show cause in which he requested that Elizabeth pay him “guideline” spousal support. In his accompanying declaration, Kenneth stated that Elizabeth had begun receiving her community share of his CalPERS pension, approximately \$2,209 per month, on September 1, 2007. Kenneth’s monthly CalPERS payment was thereby reduced to \$3,729.

Kenneth also asserted that in 2006 Elizabeth was earning approximately \$5,905 per month from her job, and claimed that her total gross monthly income (including CalPERS payment and earnings) was approximately \$8,114. He stated, “[Elizabeth] is earning approximately double my present income, and I need the Court to order her to pay me a reasonable amount of spousal support consistent with Family Code section 4320. I am currently disabled, unable to maintain gainful employment, and in failing health. . . . As a result, I am not able to find gainful employment to supplement my retirement income.”

In her responsive declaration to the order to show cause, Elizabeth opposed Kenneth’s request for spousal support. She stated that in 2006 Kenneth grossed \$10,000 more than she did, while in 2007 his adjusted income was \$6,700 more than hers. Additionally, Elizabeth noted that Kenneth had omitted his interest income on over \$170,000 that he had received when she bought out his interest in the family residence. She also claimed that she was supporting their 18-year-old daughter, a full-time college student.

As to Kenneth’s employability, Elizabeth asserted that he was capable of working but chose not to, both during the time he was on administrative leave from his position as a deputy sheriff with the Santa Clara County Sheriff’s Office and after his termination from that position.

C. Trial Evidence

A trial on the issue of spousal support modification was held on four days in 2008 and 2009. In addition to their own testimony, Kenneth and Elizabeth each presented a vocational expert. Kenneth's witnesses also included his physician and his accountant.

Kenneth was employed as a deputy sheriff in Santa Clara County from August 1976 to June 2004. Since leaving the sheriff's office, Kenneth has been living on his CalPERS pension. When he retired in 2004, Kenneth received monthly CalPERS payments of about \$5,300. He now receives monthly CalPERS payments of \$3,804. Kenneth knew at the time he signed the QDRO and the marital settlement agreement that he was giving Elizabeth her community share of his CalPERS pension and that would cause a reduction in his pension payments.

After a deduction of \$749.66 in federal and state income taxes, Kenneth receives a net monthly retirement benefit of \$3,054. His financial resources also include approximately \$193,000 that he received from Elizabeth's buyout of his interest in the family residence plus an inheritance of \$25,000. He currently has a savings account with a balance of \$128,000, which yields interest payments of \$108 per month. Kenneth makes up the difference between his monthly expenses of more than \$4,608 and his retirement income by dipping into his savings. He has not paid any child support or contributed to his daughter's health insurance or co-pays since she turned 18 in August 2007.

At the time of trial, Kenneth's age was 54. His current medical problems include arthritis and bursitis in his hips, cardiovascular problems, high blood pressure, and pain in his legs and buttocks. At the time he signed the marital settlement agreement, he was aware that he had three bulging discs in his back and arthritis in his hips, and had survived a heart attack. At present, on a scale of 1 to 10, his average level of daily pain is 5 to 7. He takes medications for his medical problems, which have worsened since July 2007 and caused an increase in his medication usage.

Kenneth has not looked for work. He does not believe that he would be able to live up to any employer's standards due to his need for completely flexible hours and the ability to stand, lie down or sit whenever he needs to do so. He was placed on administrative leave from his deputy sheriff position in June 2004 or 2005, but his leave was not disability related. Kenneth is interested in becoming a pastor and currently serves as an acting minister at his church.

Kenneth's cardiologist, Dr. Stanley Rockson, testified that he treats Kenneth for coronary artery disease and peripheral artery disease. Kenneth had a heart attack more than 10 years ago. He also had a temporary ischemic attack about two or three years ago, in 2005 or 2006, but his symptoms from that attack have resolved. Kenneth's cardiovascular problems, with the exception of the temporary ischemic attack, existed when he was working as a deputy sheriff.

Kenneth's current symptoms include chest discomfort, episodic lightheadedness, shortness of breath with moderate exertion, easy fatigability, and moderately severe constant pain. Kenneth has reported to Dr. Rockson that his symptoms are worsening. For his various medical problems, Kenneth takes nine or 10 medications. According to Dr. Rockson, Kenneth can walk less than one block without resting but he is able to carry out the activities of daily living.

In Dr. Rockson's opinion, Kenneth is "medically able to work" at "sedentary employment" if his need to take two to four breaks during an eight-hour day and change his physical position can be accommodated. Dr. Rockson believes that Kenneth could sit for one to two hours before needing to take a break. Dr. Rockson does not believe that "at this time [Kenneth] is disabled and unable to work."

Kenneth's vocational expert, Scott Simon, provided his opinion regarding Kenneth's employability, as follows: "When we take into account this gentleman's functional limitations as outlined by the doctors, and more specifically as taken into account by Dr. Rockson the cardiologist, if I utilize that medical data as a foundation and

cross that over with this gentleman's vocational history, the testing I've performed and research I've undertaken, and furthermore my own experience in having testified on these precise matters in various Court systems on several thousand occasions, I do not believe that this particular gentleman with this fact pattern would in fact be able to obtain and successfully maintain employment in the open labor market."

Scott Simon further testified that although possible occupations for Kenneth are investigator, skip tracer, and security positions, Kenneth's health problems would preclude him from taking those positions due to pain-related lack of attention and concentration, as well as his limitation on walking and his need to take unscheduled breaks and be absent from work more than three times per month. However, Simon acknowledged that no medical professional had found Kenneth to be unable to work in any capacity. Simon also acknowledged that Kenneth had worked full-time as a deputy sheriff through June 2004 despite having a heart attack in 1997.

Elizabeth's vocational expert, Cheryl Foden, testified over Kenneth's objection. Elizabeth did not disclose Cheryl Foden before trial (there was no request for mutual disclosure of expert witnesses), but after Kenneth's vocational expert, Scott Simon, testified, Elizabeth argued that Foden could testify as an impeachment witness. The trial court allowed Foden to testify, but ultimately ruled that Foden's report would be excluded because it had not been timely provided to Kenneth's attorney.

Cheryl Foden testified that she had reviewed Scott Simon's reports and believed that his vocational evaluation of Kenneth was flawed because Simon did not rely on complete information. According to Foden, Simon had not spoken directly with Dr. Rockson, Kenneth's treating physician; the medical records that Simon relied upon were not complete; Simon had not considered whether Kenneth could be trained for another occupation; and Simon had not conducted an appropriate labor market survey.

During the course of Cheryl Foden's testimony, Kenneth's attorney moved to strike the testimony on the ground that Foden was providing rebuttal, not impeachment,

testimony. The trial court denied the motion. Foden then gave her opinion that Kenneth is employable, based on her analysis of the job market and the evidence regarding his skills and medical history. She stated that Kenneth might be able to do jobs with lower stress and less physical demands, such as school crossing guard, “reception security” guard checking badges at a company, security supervisor at a retirement home, store loss prevention, teacher’s aide, process server, legal courier, alarm company dispatcher, and bill collector. Foden believes that it would be possible for Kenneth to net \$1,700 per month working part-time. Whether Kenneth’s employability would be affected by his use of prescription narcotics would have to be determined by contacting potential employers.

In her testimony, Elizabeth described her financial situation. At the time of trial, Elizabeth earned \$5,623 per month and received a monthly CalPERS payment of \$2,209 as her community share of Kenneth’s CalPERS pension. She also had retirement accounts, available cash of more than \$6,000 and real property worth \$158,000. Her monthly expenses are \$6,462, which includes supporting their adult daughter. Elizabeth also anticipated that she would bear the cost of their daughter attending college in the fall, since Kenneth had chosen not to support their daughter in any way.

Kenneth’s accountant, Michael Thompson, testified regarding the marital standard of living. In his opinion, the amount needed to bring Kenneth to the marital standard of living at or near the date of separation would be approximately \$5,011 to \$5,428. Since Kenneth’s current income is \$3,729, he needs an additional \$1,282 to \$1,699 to bring him to the marital standard of living.

D. Statement of Decision

The trial court issued its tentative decision and proposed statement of decision on June 9, 2009, which included a statement that the decision would become final in the absence of any objections by the parties pursuant to California Rules of Court,

rule 3.1590. The record reflects that no party objected to the tentative decision and proposed statement of decision.

The trial court determined that Kenneth had failed to demonstrate the material change of circumstances that must be shown before permanent spousal support may be modified. In making that determination, the court rejected Kenneth's argument that the reduction in his CalPERS pension payments upon implementation of the QDRO, as well as his deteriorating medical condition that prevented him from undertaking any kind of employment, constituted a material change of circumstance.

Specifically, the trial court found that the reduction in CalPERS pension payments did not constitute a material change of circumstances for the following reason:

"[Kenneth] knew in early July, 2007 that his payments would be reduced by [Elizabeth's] share soon after the QDRO was submitted to CalPERS. [Elizabeth] did in fact begin to receive payments the following month. It is clear that [Kenneth] was aware that his retirement payments would be reduced, when the parties negotiated and agreed to the spousal support provision found in the [marital settlement agreement]. Pursuant to [*In re Marriage of Schmir* (2005) 134 Cal.App.4th 43], [Kenneth] cannot now rely on the reduction as representing a change of circumstance because this change was contemplated by the parties at the time support was originally negotiated."

The trial court also found that Kenneth's alleged inability to work did not constitute a material change in circumstances, for several reasons. First, the court determined that Kenneth's trial evidence was insufficient to prove that he had no earning capacity, since Dr. Rockson testified that Kenneth "has the potential to work as much as an eight-hour day under appropriate conditions."

Second, the evidence showed that Kenneth had essentially the same medical conditions at the time the marital settlement agreement was executed as at the time of trial, although the court acknowledged that his symptoms had worsened. Therefore, the

court did not “find a material change in his ability to work, from the time that the [marital settlement agreement] was signed to the time of trial.”

Third, the trial court determined that even assuming that Kenneth was disabled and unable to work in any capacity, the court would still find no material change of circumstances. “[Kenneth] was not working in July, 2007 when he negotiated the [marital settlement agreement], and [he] offered no testimony or evidence to suggest that he relied on his alleged ability to work when he agreed to set support at zero in 2007. To the contrary, the fact that [Kenneth] had not worked for three years prior to the [marital settlement agreement] demonstrates that his ability to work was not an important consideration for [Kenneth]. The Court was not presented evidence to suggest that [Kenneth] ever intended to return to work at any time after his retirement in July, 2004. Under these facts, there is no change between the circumstances that existed in 2007 and the circumstances that exist now.”

Having determined that Kenneth had failed to demonstrate a material change of circumstances, the trial court denied his motion for modification of permanent spousal support. Kenneth filed a timely notice of appeal from the June 9, 2009 order on August 4, 2009.

III. DISCUSSION

On appeal, Kenneth raises two issues: (1) the trial court abused its discretion by failing to modify spousal support and award him an amount of spousal support consistent with the marital standard of living; and (2) the trial court erred in allowing Elizabeth’s vocational expert, Cheryl Foden, to testify although Elizabeth had failed to disclose her as an expert witness before trial.

Because we find it dispositive, we will address the issue of spousal support modification first.

A. Modification of Spousal Support

It is well established that “[m]odification of spousal support, even if the prior amount is established by agreement, requires a material change of circumstances since the last order. [Citations.]” (*In re Marriage of McCann* (1996) 41 Cal.App.4th 978, 982.) “ ‘Absent a change of circumstances, a motion for modification is nothing more than an impermissible collateral attack on a prior final order. [Citation.]’ [Citation.]” (*In re Marriage of Biderman* (1992) 5 Cal.App.4th 409, 413.) Thus, a motion for modification of spousal support may be granted only if there has been a material change of circumstances since the previous order. (*In re Marriage of Schmir, supra*, 134 Cal.App.4th at p. 47 (*Schmir*).)

“ ‘Change of circumstances’ means a reduction or increase in the supporting spouse’s ability to pay and/or an increase or decrease in the supported spouse’s needs. It includes all factors affecting need and ability to pay.” (*In re Marriage of West* (2007) 152 Cal.App.4th 240, 246.) “The moving party has the burden of showing a material change of circumstances since the last order was made. [Citation.]” (*In re Marriage of Tydlaska* (2003) 114 Cal.App.4th 572, 575 (*Tydlaska*).)

A trial court has broad discretion in deciding whether to modify a spousal support order. (*Tydlaska, supra*, 114 Cal.App.4th at p. 595.) The standard of review is therefore abuse of discretion. (*Ibid.*) “In exercising its discretion the trial court must follow established legal principles and base its findings on substantial evidence.” (*Schmir, supra*, 134 Cal.App.4th at p. 47.) Therefore, “an abuse occurs when a court modifies a support order without substantial evidence of a material change of circumstances. [Citations.]” (*In re Marriage of McCann, supra*, 41 Cal.App.4th at p. 983.) Where, as here, a statement of decision “sets forth the factual and legal basis for the decision, any conflict in the evidence or reasonable inferences to be drawn from the facts will be resolved in support of the determination of the trial court decision. [Citations.]” (*In re Marriage of Hoffmeister* (1987) 191 Cal.App.3d 351, 358.)

B. *Analysis*

In the present case, Kenneth argues that the trial court lacked substantial evidence to support its finding that he had failed to make the requisite showing of changed circumstances. According to Kenneth, he demonstrated a sufficient change of circumstances in three respects, including his “health, reduction in finances, and unsuitability for any job market.” The evidence that Kenneth relies upon to support a finding of changed circumstances includes Dr. Rockson’s testimony regarding Kenneth’s declining health since August 2007, the effective date of the marital settlement agreement; the corresponding decrease in his employability; and Elizabeth’s taking of a “substantial portion of [Kenneth’s] only source of income.”

Elizabeth on the other hand, argues that the trial court’s findings are supported by substantial evidence. She asserts that the trial court’s finding that Kenneth’s medical condition was essentially unchanged, between the time the marital settlement agreement was signed in July 2007 and the time of trial, is supported by the evidence showing that his health was poor in July 2007 and there were no new diagnoses between July 2007 and the end of trial in early 2009.

She also argues that Kenneth’s alleged inability to work at the time of trial was not a material change of circumstance, for two reasons. First, because the evidence showed that Kenneth had not tried to work for the three years preceding the marital settlement agreement in July 2007, and, second, because there was no evidence that he ever intended to work after retiring in July 2004.

In reviewing the trial court’s order denying Kenneth’s motion for modification of spousal support, we are mindful that the parties agreed to zero spousal support in their marital settlement agreement. “ ‘[A] marital settlement agreement is a contract between the parties. [Citations.] Where the agreement permits modifications, those modifications require a showing of a change in circumstances. [Citations.] Moreover, in determining what constitutes a change in circumstances the trial court is bound to give effect to the

intent and reasonable expectations of the parties as expressed in the agreement,’ and, thus, ‘the trial court’s discretion to modify the spousal support order is constrained by the terms of the marital settlement agreement.’ [Citations.]” (*In re Marriage of Dietz* (2009) 176 Cal.App.4th 387, 398 (*Dietz*).) “The court may not simply reevaluate the spousal support award.” (*In re Marriage of Aninger* (1990) 220 Cal.App.3d 230, 238.)

Thus, it has been held that increases in the accessibility and possible value of a supported spouse’s retirement accounts do not constitute a material change of circumstances where the parties’ stipulated judgment provided that the supported spouse would receive her community share of the retirement accounts and spousal support, since the parties reasonably expected those increases when they entered into the stipulated judgment. (*Dietz, supra*, 176 Cal.App.4th at p. 399.)

Accordingly, to determine whether substantial evidence supports the trial court’s finding that Kenneth failed to demonstrate any material changed circumstances, we first determine “ ‘the intent and reasonable expectations of the parties as expressed’ ” in their marital settlement agreement and their agreed-upon QDRO. (*Dietz, supra*, 176 Cal.App.4th at p. 398.) Since Kenneth admitted during his trial testimony that he knew, at the time he signed the marital settlement agreement and agreed to the QDRO, that his CalPERS pension payments would be reduced when Elizabeth began receiving her community share of the CalPERS pension, and his expectation of reduced pension payments was reasonable, we find that substantial evidence supports the trial court’s ruling that the reduction in Kenneth’s retirement benefits following the signing of the marital settlement agreement does not constitute a material change of circumstances.

Second, we consider Kenneth’s contention that the evidence shows the following material change of circumstances: since he signed the marital settlement agreement and agreed to the QDRO’s division of his CalPERS pension, he became unable to work due to his deteriorating medical condition, and therefore he cannot supplement his reduced CalPERS pension payments with earnings that would allow him to reach the marital

standard of living. We find that substantial evidence supports the trial court's finding that Kenneth failed to show a change in his ability to work.

In order to show that he had become unemployable due to his deteriorating medical condition, Kenneth had the burden to make a threshold showing that he was employable at the time he signed the marital settlement agreement and that he intended to supplement his reduced CalPERS pension with earnings from employment. As the trial court correctly found, Kenneth failed to make any showing in that regard, and the evidence established that he had not worked for the three years preceding execution of the marital settlement agreement in 2007. Therefore, substantial evidence supports the trial court's finding that Kenneth failed to show a material change of circumstances regarding his employability.

Finally, we determine that absent a showing of a material change of circumstances regarding Kenneth's employability, the evidence of his deteriorating medical condition alone is insufficient to show a material change of circumstances.

For these reasons, we conclude that the trial court did not abuse its discretion in denying Kenneth's motion for modification of spousal support.

C. Testimony of Cheryl Foden

Kenneth's second contention on appeal is that the trial court erred in allowing Elizabeth's vocational expert, Cheryl Foden, to testify at trial although Elizabeth had failed to disclose her as an expert witness prior to trial. Having determined, as discussed above, that substantial evidence supports the trial court's finding that Kenneth failed to show that, even assuming he is unemployable, his unemployability constitutes a material change of circumstances, we need not address this issue.

IV. DISPOSITION

The order of June 9, 2009, denying appellant Kenneth Nelson's motion for modification of child support is affirmed. Costs on appeal are awarded to respondent Elizabeth Nelson.

BAMATTRE-MANOUKIAN, ACTING P.J.

WE CONCUR:

MCADAMS, J.

DUFFY, J.